Filed 8/13/21 In re G.B. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re G.B., a Minor.	
L.P., Petitioner and Respondent, v. P.E., Objector and Appellant.	E076895 (Super.Ct.No. FFCSS2000027) OPINION

APPEAL from the Superior Court of San Bernardino County. Dina I. Amani, Commissioner. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Objector and Appellant.

John L. Dodd & Associates and John L. Dodd for Petitioner and Respondent.

Paula E. (mother) appeals from the termination of her parental rights to her minor son G.B. under Family Code section 7822, subdivision (a)(2) (section 7822(a)(2)). We affirm.

BACKGROUND

G.B. was born in November 2006, while mother was incarcerated. When G.B. was two or three days old, he began living fulltime with his paternal grandmother, Linda P. (grandmother). When G.B. was 13 years old, in June 2020, grandmother filed a petition to free G.B. from mother's custody and control, so that grandmother could adopt G.B. Mother opposed the petition.

Pursuant to Family Code sections 7850 and 7851 (further statutory references are to this code), a social worker conducted an investigation and filed with the court a written report containing the social worker's findings and recommendation on the disposition of the petition in light of G.B.'s best interest. The social worker interviewed grandmother, father, and G.B. The social worker attempted to contact mother multiple times by telephone and by text message, but mother did not respond. Father told the social worker that he was willing to relinquish his parental rights and wanted grandmother to adopt G.B.

The social worker interviewed G.B. by himself. G.B. wanted grandmother to adopt him, so that he could "'stay with her forever.'" He had lived with her for 13 years and felt happy, comfortable, and safe with her and loved by her. Grandmother took good care of him. The social worker believed that G.B. was "highly bonded" to grandmother and thriving in her home.

As to mother, G.B. said that "she [was] like a stranger to [him]" and that he was "'okay'" with her parental rights being terminated. Mother had not visited him in 12 years or sent him a card. G.B. said that mother "'randomly'" visited him at his house

after 12 years, but he did not provide any details about those visits. He said that mother "'says she will do things, but she does not do them.'" G.B. was not interested in participating in the court proceedings.

Grandmother told the social worker that mother had visited G.B. four times over the course of his life—once on his first birthday and then three short visits in late 2019. Mother had not attempted to schedule any visits with G.B. in the intervening 12 years and never provided grandmother with any financial support for G.B.'s care. The social worker recommended that it was in G.B.'s best interest to be freed from mother's custody and control and made available for adoption by grandmother.

In declarations opposing the petition, mother claimed that she never intended to abandon G.B. Mother claimed that for the first year of G.B.'s life, her family helped care for G.B. by purchasing items such as diapers and formula, giving grandmother money, and taking care of him on weekends. Mother said that when she was released from prison in August 2007 and G.B. was an infant, she called grandmother regularly and attempted to see G.B. According to mother, grandmother threatened her, telling mother that she would be trespassing if she came to grandmother's house and reminding mother that she was on parole. Mother says that she feared being arrested and consequently stopped trying to see G.B. But Mother also claimed to have visited G.B. at his house "on occasion" with grandmother supervising, although mother could not recall any specific dates of those visits.

Mother claimed that in 2012, grandmother told mother "to write an essay on what [her] motives and intentions for seeing [G.B.] were." Mother also claimed to have sent

"numerous letters and birthday cards" to G.B. "[o]ver the years" but received no confirmation that they had been received. Mother further asserted that in 2014 and 2015, when she was incarcerated and living at a particular transitional reentry program, her counselor encouraged her to contact grandmother, so she called and wrote grandmother on a weekly basis but did not receive any response. Mother said her counselor left voice messages for grandmother as well and received no response.

In October 2019, when G.B. was 12 years old, mother arrived unannounced at grandmother's house and was allowed to visit G.B. with grandmother's supervision. Mother said that G.B. was happy to see her, called her "Mom," and told her that he loved her. Mother then attended three or four of G.B.'s soccer games. Mother believed that G.B. was afraid to talk to her at those games. Mother said that in November 2019 grandmother refused to let mother speak to G.B. on the telephone because he was sick, but mother also said that telephone conversation was the last time she spoke with G.B.)

In December 2019, mother was diagnosed with stage four cancer with a poor prognosis, and she wanted to establish a relationship with G.B. In February 2020 (before grandmother filed her petition under section 7822(a)(2)), mother filed a request for order in a family court proceeding against father seeking visitation with G.B.

In her opposition to grandmother's petition, mother stated that she did not want custody of G.B. Mother added, "I wish to emphasize that my intention is not, and has never been, to take [G.B.] away from [grandmother] as I understand that is who raised him, and it is simply in his best interests that he remains in her primary care."

Mother and grandmother testified at a contested hearing, and father testified at an earlier hearing. Father testified that grandmother had done "a great job" raising G.B. Father did not object to terminating his parental rights so that grandmother could adopt G.B. Father believed that it was in G.B.'s best interest for grandmother to adopt G.B.

Grandmother testified that she had financially supported G.B. his entire life (14 years) since he started living with her when he was two days old. According to grandmother, mother never provided any financial support for G.B. but did provide a few outfits for G.B. around his first birthday. Mother also visited G.B. once or twice before his first birthday, again on his first birthday in 2007, and once for 15 minutes a few months after his first birthday. After that, mother did not have any contact with G.B. until 2019. Grandmother testified that she never prevented mother from seeing G.B. or denied any request by mother to see G.B. Grandmother explained that she was able to sign G.B. up for school only with father's help.

Grandmother gave the following account of mother's recent contacts with G.B.: In October 2019, Mother arrived unannounced at grandmother's house and told grandmother that she was sick, so grandmother introduced her to G.B. and let them spend some time together, mostly under grandmother's supervision. Mother promised to donate to G.B.'s school fundraiser, to buy him electronics and certain clothing he wanted, and to sign his passport application so he could travel on a school trip to Mexico. G.B. seemed happy. Mother accompanied G.B. to his room without grandmother so G.B. could show mother his "LEGO"s. The visit lasted approximately one hour.

Grandmother invited mother to one of G.B.'s soccer games a few days later, and mother attended. After the game, mother went to G.B., who was among other players, and put her hands around him and on his face. Mother visited with G.B. for approximately 15 minutes. G.B. told grandmother he did not want mother to attend any more of his games. One week later, mother attended a second soccer game and visited with him for approximately 15 minutes. Mother wanted to go out to eat with G.B., but he did not want to go.

Around 10 days later, mother was supposed to get documents notarized for G.B.'s passport, but she missed the appointment and did not call grandmother. G.B. was sad because he was looking forward to getting his passport. Mother did not give G.B. Christmas or birthday cards or gifts in 2019 or 2020.

Grandmother testified that G.B. performed well in school, played various sports and musical instruments, and travelled with grandmother. Grandmother had a good relationship with G.B. and loved him very much. G.B. called her "mom." Grandmother wanted to adopt G.B. and believed it would be in his best interest. Grandmother sought to adopt G.B. after mother filed for visitation in the family law proceeding against father because grandmother believed that G.B. needed a permanent home from which he understood that no one could remove him.

Mother testified and admitted that she had not provided any financial support for G.B. Over the course of his life, she had been incarcerated four times starting in 2007 for a total of approximately nine years by the time of the hearing in 2021. Mother admitted that she had not filed any actions seeking custody or visitation of G.B. before 2020.

However, mother claimed that she had attempted to contact G.B. "many of times" by calling and leaving voice messages and by sending "hundreds of letters to the house" while she was incarcerated. Mother said she never received a response. Mother could not recall the specific dates that she had attempted to communicate with G.B. Mother stated that on more than one occasion grandmother had threatened to call mother's probation officer if mother showed up at grandmother's residence, because mother would be trespassing. Mother also said that most of the requests she made "to have contact with" G.B. were through talking with father. Father suggested that mother speak with grandmother but also warned mother that grandmother would call the police on mother. Mother said she never intended to abandon G.B. She also confirmed that she does not want "to take him out of" grandmother's home.

Having considered all of the documentary and testimonial evidence, including the social worker's investigative report, the trial court found under section 7822(a)(2) that mother left G.B. in the care and custody of grandmother for a period of more than 13 years with no contact and no financial, physical, or emotional support. The trial court also found that mother "left the minor child without any communication for a period of more than six months with the intent to abandon [G.B.] as set forth in section 7822(a)(2)." The trial court expressly found that the three visits mother had with G.B. were brief and insignificant "'token efforts'" that did not create a "meaningful relationship" with G.B. The court found that G.B.'s welfare and best interests were "best achieved by providing him with a permanent stable and secure home with" grandmother, and that court accordingly terminated mother's parental rights. The court ordered G.B.

freed from the custody and control of mother to be made available for adoption by grandmother.

DISCUSSION

A. *Sufficient Evidence of Abandonment*

Mother argues that the record contains insufficient evidence that she voluntarily left G.B. with grandmother, failed to maintain contact with him, and intended to abandon him. She also argues that the trial court failed to consider G.B.'s best interest. Her arguments lack merit.

"The Family Code authorizes a court to terminate parental rights if the parent has abandoned their child." (*In re H.D.* (2019) 35 Cal.App.5th 42, 50 (*H.D.*).) The purpose of the statutory scheme allowing for the termination of parental rights under such circumstances is "to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life." (§ 7800.)

Under section 7822(a)(2), a child may be declared free from a parent's custody and control if the following three criteria are met: (1) The child has been left in "the care and custody of another person for a period of six months," (2) the child was left without any provision for the child's support or without communication from the parent, and (3) the parent left the child with the intent to abandon the child. (§ 7822(a)(2); *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010 (*Allison C.*).) A parent's "failure to provide support[] or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or

communicate with the child, the court may declare the child abandoned by the parent or parents." (§ 7822, subd. (b).) "The parent need not intend to abandon the child permanently; rather, it is sufficient that the parent had the intent to abandon the child during the statutory period." (*In re Amy A.* (2005) 132 Cal.App.4th 63, 68 (*Amy A.*).) The six-month statutory period begins when "there is a claimed voluntary relinquishment of custody and control by the parent," which need not be the same time that the child came into the care and custody of the petitioner. (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 501 (*Jill & Victor D.*).) In ruling on a petition under section 7822(a)(2), the court also "shall consider the wishes of the child, bearing in mind the age of the child, and shall act in the best interest of the child." (§ 7890; *In re E.M.* (2014) 228 Cal.App.4th 828, 847.)

Section 7821 provides that the trial court's findings "shall be supported by clear and convincing evidence, except as otherwise provided." (§ 7821.) Neither section 7822 nor section 7890 prescribes a different standard. We review for substantial evidence the trial court's express and implied findings. (*H.D.*, *supra*, 35 Cal.App.5th at p. 50; *In re Rose G.* (1976) 57 Cal.App.3d 406, 425 [substantial evidence supports trial court's implied findings to free children from parents' custody and control]; *In re Mark V.* (1986) 177 Cal.App.3d 754, 757 [reviewing best interest finding for substantial evidence].)

In reviewing the sufficiency of the evidence, we take into account the clear and convincing evidence standard applied in the trial court. (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005.) We "determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of

high probability demanded by this standard of proof." (*Ibid.*) We "view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence." (*Id.* at pp. 1011-1012.)

As to the requirement that the child be left with another person for a period of six months, this court recently explained that "a literal physical desertion" is not required. (*H.D., supra*, 35 Cal.App.5th at p. 51, italics omitted.) We focus instead "'on the voluntary nature of a parent's abandonment of the parental role.'" (*Ibid.*, italics omitted; *Amy A., supra*, 132 Cal.App.4th at p. 69.) But abandonment cannot be "'established by acts of relinquishment committed under circumstances of coercion.'" (*H.D.*, at p. 51.)

Focusing entirely on the evidence she presented in opposition to the petition, mother argues that there was insufficient evidence supporting the threshold finding that she voluntarily abandoned or left G.B. in grandmother's care and custody for a period of six months. The argument fails because mother does not explain why the evidence *supporting* the trial court's order is insufficient as a matter of law. (See *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1410.) The argument also suffers from at least one additional defect. In support of her argument, mother contends that the evidence is insufficient because she "never intended to abandon" G.B. But whether mother harbored an intent to abandon G.B. is not relevant to the threshold question of whether she left G.B. in grandmother's care and custody by voluntarily relinquishing her parental role for a period of six months. Whether mother intended to abandon G.B. is a separate issue. (§ 7822(a)(2).)

Substantial evidence supports the trial court's finding that mother voluntarily abandoned her parental role by leaving G.B. in the custody and care of grandmother for a period of six months. After G.B. was about one year old, mother did not have any contact with G.B. until he was almost 13 years old. Thus, for nearly 12 years of G.B.'s life, mother did not occupy any role in G.B.'s life, let alone a meaningful or parental role. Given the evidence of mother's complete absence from G.B.'s life for almost his entire life, substantial evidence supports the trial court's finding that mother did not provide G.B. the physical or emotional support ordinarily provided to a child by a parent.

Mother seems to argue that the abandonment was coerced and therefore not voluntary because her alleged attempts to contact G.B. "over the years" were purportedly ignored and she purportedly was threatened with trespassing if she attempted to visit G.B. The trial court did not make an express finding on the parties' credibility or on whether grandmother had ever threatened mother. However, because the trial court concluded that mother had left G.B. with grandmother for "a period of more than 13 years", the trial court must have determined that mother voluntarily abandoned her parental role for that period. The trial court therefore implicitly found that grandmother had not threatened mother to deter mother from visiting G.B. That finding is supported by substantial evidence. Grandmother testified that she had never prevented mother from seeing G.B. or denied any request by mother to see G.B. The trial court could infer from that evidence that mother never asked grandmother to see G.B. during the periods when mother was not incarcerated. The trial court was free to disbelieve mother's testimony to the contrary that grandmother prevented her from seeing G.B. by threatening mother and

ignoring mother's attempts to contact him. (*Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 506.)

Mother also argues that there was not sufficient evidence that she failed to maintain contact with G.B. for the six-month statutory period, but she concedes that she never provided financial support for G.B. Mother mistakenly claims that her failure to support G.B. is not relevant. The second element of section 7822(a)(2) requires that the parent either left the child without any provision for support or did not communicate with the child. Thus, mother's admitted failure to provide financial support for G.B. throughout his lifetime is sufficient to prove the second element. (See *Allison C.*, *supra*, 164 Cal.App.4th at p. 1013; *Adoption of A.B.* (2016) 2 Cal.App.5th 912, 923, fn. 10.) In any event, substantial evidence also supports the trial court's finding that mother did not communicate with G.B. for over 10 years, significantly longer than the six-month statutory period. Again, the trial court was free to credit grandmother's testimony that she never prevented mother from seeing G.B. and to disbelieve mother regarding her purported efforts to contact G.B. and the purported contact that she had with G.B. over the years.

Mother also challenges the sufficiency of the evidence supporting the trial court's finding that she intended to abandon G.B. As mother correctly acknowledges, the trial court's findings that mother failed to communicate with G.B. or to provide financial support each independently gave rise to the presumption that mother intended to abandon G.B. within the meaning of section 7822(a)(2). (§ 7822, subd. (b); *Amy A.*, *supra*, 132 Cal.App.4th at p. 68.) Mother argues that the presumption was not triggered, however,

because the trial court's findings of her failure to communicate and to provide financial support were not supported by substantial evidence. The argument fails because, as we have already explained, both of the findings were supported by substantial evidence. (In addition, mother's assertion that the finding of failure to provide financial support was not support by substantial evidence directly contradicts her express concession that she did not financially support G.B.)

We also reject mother's alternative argument that she presented sufficient evidence to rebut the presumption. In support of that argument, mother points to the evidence that she "stated that she never intended to abandon" G.B. and that her initial unplanned visit with G.B. in October 2019 went well. But as she otherwise correctly recognizes, mother's statement about her intent is not sufficient to overcome the statutory presumption of mother's intent to abandon G.B. (*Adoption of Oukes* (1971) 14 Cal.App.3d 459, 467; *In re Bisenius* (1959) 173 Cal.App.2d 518, 522.) Nor does the fact that mother had a pleasant visit with G.B. after almost 12 years of no contact overcome the presumption that she intended to abandon G.B. during those 12 years. The trial court could reasonably infer from the many years that mother did not communicate with or support G.B. that mother intended to abandon G.B. during that period.

Mother also claims that the trial court erred by failing to consider G.B.'s best interest. (§ 7891.) The record refutes that claim. The trial court expressly found that terminating mother's parental rights in order to free G.B. for adoption by grandmother was in G.B.'s best interest, and that finding also is supported by substantial evidence. G.B. spent his entire life in grandmother's home and was thriving there. He loved

grandmother and wanted to be adopted by her. The social worker recommended that terminating mother's parental rights in order to free him to be adopted by grandmother was in G.B.'s best interest. Father voluntarily relinquished his parental rights and believed it was in G.B.'s best interest to be adopted by grandmother. Indeed, mother even admitted that she believed it was in G.B.'s best interest to remain in grandmother's care.

Because the trial court's findings are supported by substantial evidence, we conclude that the trial court did not err by concluding that mother abandoned G.B. within the meaning of section 7822(a)(2).

B. *Appointment of Counsel for G.B.*

Mother argues that the trial court erred by not considering appointing counsel for G.B. and by not appointing counsel. Mother did not make that argument in the trial court, so we consider it forfeited. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*), superseded by statute on another ground as stated in *In re M.R.* (2005) 132 Cal.App.4th 269, 273-274; *In re Heidi T.* (1978) 87 Cal.App.3d 864, 876.) Mother relies on *Neumann v. Melger* (2004) 121 Cal.App.4th 152, 164-165 (*Neumann*) for the proposition that the forfeiture rule should not be applied here because it would offend the public policy and legislative goal of protecting the child's best interest. In *Neumann*, in addition to not considering appointment of counsel, the trial court did not interview the oldest child, and the evaluator's report on the children's best interest was not admitted into evidence or considered by the court. (*Id.* at p. 163.) Here, the trial court considered the social worker's report, which included a description of her interview of G.B. G.B.'s views

therefore were related to the court, albeit in written form only, so the reasons for excusing the forfeiture in *Neumann* are not present here.

In any event, insofar as the trial court erred, the error was harmless. At the beginning of a proceeding to terminate parental rights under section 7822, the court is statutorily required to consider "whether the interests of the child require the appointment of counsel." (§§ 7861, 7860; *Neumann*, *supra*, 121 Cal.App.4th at p. 171.) The appointment of counsel for a minor under this provision is discretionary. (*In re Richard E.* (1978) 21 Cal.3d 349, 354 (*Richard E.*); *Adoption of Jacob C.* (1994) 25 Cal.App.4th 617, 625.) But the trial court "'must exercise its discretion.'" (*Adoption of Jacob C.*, *supra*, at p. 625.) Here, nothing in the record demonstrates that the trial court considered appointing counsel for G.B. If the court did not consider it, that failure would constitute error. (*Neumann*, at p. 171.)

Assuming for the sake of argument that the trial court committed that error, it was harmless. The "failure to appoint counsel for a minor in a freedom from parental custody and control proceeding does not require reversal of the judgment in the absence of miscarriage of justice." (*Richard E.*, *supra*, 21 Cal.3d at p. 355; *In re Mario C.* (1990) 226 Cal.App.3d 599, 606 (*Mario C.*).) Consequently, we can reverse the trial court's order terminating mother's parental rights on the basis of the trial court's failure to consider appointing counsel for G.B. only if there is "a reasonable probability the outcome would have been different but for the error." (*In re Celine R.* (2003) 31 Cal.4th 45, 60 [standard applied to appointment of separate counsel for sibling in termination of parental rights in dependency].)

There is nothing in the record suggesting that mother would have achieved a more favorable outcome if counsel had been appointed to represent G.B. (*Richard E.*, *supra*, 21 Cal.3d at p. 355.) The record contains no evidence that G.B. wanted or would benefit from denial of the petition. In his interview with the social worker, G.B. expressed unequivocally that he wanted to be adopted by grandmother, whom he loved and knew loved him. He felt happy, comfortable, and safe with grandmother. G.B. did not object to termination of mother's parental rights and considered mother to be "like a stranger" because she had not visited him in 12 years. G.B. did not want to participate in the proceeding. Thus, G.B.'s views about grandmother, mother, and the proceeding were more than adequately related to the court. While G.B.'s wishes are not conclusive on the issue of his best interest (*Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 135, superseded by statute on another ground as stated in *Mario C.*, *supra*, 226 Cal.App.3d at p. 606), there is nothing in the record to suggest that his wishes or best interests were inadequately represented or that appointment of counsel would have altered the outcome of the proceeding. On the contrary, the record suggests that if counsel had been appointed for G.B., appointed counsel would have argued in favor of granting grandmother's petition.

Mother contends otherwise, challenging the adequacy of the social worker's investigation and report on numerous grounds, including that it was conducted by a private adoption agency retained by grandmother. But mother did not challenge the social worker's report in the trial court, so we consider her argument forfeited. (See *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [failure to raise adequacy of adoption

assessment report in proceeding under Welf. & Inst. Code, § 366.26 amounts to forfeiture of issue on appeal].) In any event, the report was admitted, read, and considered by the court, as required by statute (§ 7851, subd. (d)), and on appeal we do not reweigh the evidence (*Crawford v. Commission on Professional Competence of Jurupa Unified School District* (2020) 53 Cal.App.5th 327, 336).

In addition to G.B.'s wishes as expressed in the social worker's report, the record contains ample evidence that it was in G.B.'s best interest to grant grandmother's petition to terminate mother's parental rights. G.B. had lived with grandmother his entire life and was thriving in the loving home she provided, and grandmother was committed to adopting him. Mother, on the other hand, had not seen G.B. for nearly 12 years when she showed up unannounced less than one month before his 13th birthday. She then only visited with him briefly on three occasions and failed to keep her promise to him that she would notarize documents for his passport application. Moreover, mother did not want custody of G.B. and admitted that it was in G.B.'s best interest for him to remain in grandmother's home.

Given the overwhelming evidence supporting grandmother's petition, we conclude that it was not reasonably probable that mother would have obtained a more favorable outcome if the trial court had appointed counsel for G.B.[1]

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[1] In her reply brief, mother cites section 7891 for the proposition that the trial court must interview a child over age 10 in chambers. It is not clear whether mother is claiming that the trial court erred in this regard. To the extent that she is, we consider the argument forfeited because mother failed to make it below, makes it for the first time in her reply brief, and has not demonstrated good cause for failing to make the argument in

DISPOSITION

The order terminating mother's parental rights is affirmed.

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MENETREZ
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.

her opening brief. (*S.B.*, *supra*, 32 Cal.4th at p. 1293; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)